United States Court of Appeals

for the Second Circuit

APPENDIX

75-7267

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

P/S

NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY,

Plaintiff-Appellee

v.

CENTRAL VERMONT PUBLIC SERVICE CORP.,
and RUTLAND CABLE TV, INC.,

Defendants,

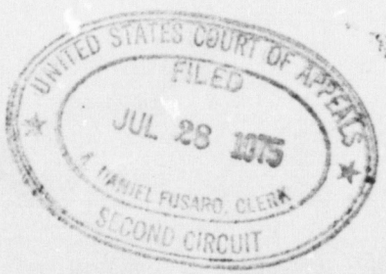
CENTRAL VERMONT PUBLIC SERVICE CORP.,

Defendant-Appellant

J O I N T A P P E N D I X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT



PIERSON, AFFOLTER & AMIDON,
Attorneys for the Plaintiff-Appellee
253 South Union Street
Burlington, Vermont 05401

DINSE, ALLEN & ERDMANN,
Attorneys for Defendant-Appellant
186 College Street
Burlington, Vermont 05401

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JO[illegible]PPENDIX

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2-16-70

CIVIL DOCKET

UNITED STATES DISTRICT COURT

No. 6502

OAKES

Jury demand date: 1-21-72 by Plaintiff.
2-18-72 by Def. Osmose Wood Preserving
2-24-72 by Def. New Eng. Tel. & T

D. C. Form No. 106 Rev.

JURY

COURT

TITLE OF CASE

David G. Sharp

vs.

Osmose Wood Preserving Co. of America, Inc. and New England Telephone and Telegraph Co.

(Separate Trial)

New England Telephone and Telegraph Co.

vs.

Central Vermont Public Service Corporation and Rutland Cable T. V., Inc.

ATTORNEYS

For plaintiff: Giffin
Theodore Corsones, Esq.
Rutland, Vermont

For defendant: Osmose Wood etc.
Miller & Hill, Esqs.
Rutland, Vermont

~~Ryan, Smith & Carbine, Esqs.~~
~~Rutland, Vt., for Def. New Eng Telephone & Telegraph Co.~~ See P.H-H
Douglas C. Pierson, Esq.
Richard W. Affolter, Esq.
Burlington, Vt., for Deft. New Tel. & Tel. Co.

~~Wick~~, Dinse & Allen, Esqs. Edmann
Burlington, Vt., for Deft. Central Vt. Public Service Corp.

Theriault & Joslin, Esqs.
Montpelier, Vt., for Deft. Rutl T. V., Inc.

STATISTICAL RECORD	COSTS			DATE 1972	NAME OR RECEIPT NO.	REC.		
J.S. 5 mailed FEB 4 1972	Clerk			1-21	#19174	15	00	
				"	C.D. #33			15
J.S. 6 mailed MAY 5 1975	Marshal	22	54	4-29	#24121	5	00	
				4-30	C.D. #45			5
Basis of Action: Tort	Docket fee	20	00					
	Witness fees	179	20					
Action arose at: 2	Depositions							

An Entire Civil

DATE 1972	PROCEEDINGS	Date Order Judgment No
Jan. 21	Filed Complaint.	1.
" "	Issued Summons and delivered same to Marshal for service.	
Feb. 1	Filed " returned served.	2.
" 18	Filed Notice of Appearance of Miller & Hill, Esqs. for Defendant Osmose Wood Preserving Co. of America, Inc.; Defendant Osmose's Motion to Dismiss; Defendant Osmose's Answer and Certificate of Service.	3.
" 24	" Notice of Appearance of Ryan, Smith & Carbine, Esqs., for Defendant New England Telephone & Telegraph Co., Answer of Defendant New England Telephone & Telegraph Co., Notice Under Rule 5 and Certificate of Service.	4.
Mar. 28	" Plaintiff's Motion for Production and Certificate of Service.	5.
May 3	" Motion to Withdraw of Ryan, Smith & Carbine, Esqs., as Counsel for New England Telephone & Telegraph Co., and Certificate of Service.	6.
" "	" Notice of Appearance of Douglas C. Pierson and Richard W. Affolter, Esqs., for Defendant New England Telephone & Telegraph Co. and Certificate of Service.	7.
" 19	" Order re opposed Motions and Objections involving discovery. Mailed copy to attorneys.	8.
July 12	" Defendant New England Telephone & Telegraph Co.'s Motion to bring in Third-Party Defendants and Certificate of Service.	9.
Aug. 7	Filed Plaintiff's consent to Defendants' Motion to bring in a Third Party Defendant.	10.
" 28	Filed Defendant Wood's consent to Defendant New England Telephone's Motion to bring in a third party Defendant.	11.
Sept. 1	Upon consideration of Motion to Withdraw of Ryan, Smith & Carbine, Esqs., as counsel for New England Telephone & Telegraph Co., it appearing that Pierson, Affolter & Amidon, Esqs., have entered their appearance for said Defendant, it is	
" "	ORDERED: Motion granted. Attorneys notified.	
" 7	Filed Order on Motion to bring in third-party defendants. Mailed copies to attorneys.	12.
Aug. 28	" Third-Party Complaint.	13.
Sept. 7	Issued Third-Party Summons and delivered same to Marshal for service.	
" 15	Filed Third-Party Summons returned served.	14.
" 22	Filed Request for Admissions of defendant Osmose to defendant New England Telephone and certificate of service.	15.
Oct. 2	At the Call of the Calendar before Judge Holden, it was	
" "	ORDERED: Case continued.	
" 3	Filed Notice of Appearance of Theriault & Joslin, Esqs., for Third-Party Defendant Rutland Cable T. V., Inc., Notice Under Rule 5 and Certificate of Service.	16.
" 4	Filed Defendant New England Telephone's Answer to Requests for Admission filed by Defendant Osmose, & Certificate of Service.	17.
" 25	" Notice of Appearance of Wick, Dinse & Allen, Esqs., for Deft. Central Vt. Public Service Corp., and Deft. Central Vt. Public Service Corp.'s Answer.	18.
Nov. 2	" Third-Party Defendant Central Vermont Public Service Corp.'s Request to Defendant Osmose Wood Preserving Co. of America, Inc. to Produce.	19.
" "	" Third-Party Deft. Central Vt. Public Service Corp.'s Request to Defendant New England Tel. & Tel. Co. to Produce.	20
	(Cont'd)	

DATE 1972	PROCEEDINGS	Date Ord Judgment
Nov. 2	Filed Third-Party Deft. Central Vt. Public Service Corp's. Request to Plaintiff David G. Sharp to Produce.	21
" "	" Third-Party Deft. Central Vt. Public Service Corp's. Request to Defendant Rutland Cable T.V. Inc. to Produce.	22
" 3	Filed Answer of third-party defendant, Rutland Cable T.V., Inc..	23.
Dec. 5	At the Call of the Calendar before Judge Holden, it was	
" "	ORDERED: That a pretrial conference be held,	✓
Dec. 6	Filed stipulation for continuance from the Rutland Term.	24.
" 7	" Defendant New England Tel. & Tel. Co.'s Request to Plaintiff for Production of Documents Under Rule 34.	25.
" "	" Deft. New England Tel. & Tel. Co.'s Interrogatories re Expert to Pltf.	26.
Dec. 8	Upon consideration of Stipulation for Continuance from the Rutland Term, it is	
" "	ORDERED: Continued to May 1, 1973. Attorneys notified.	✓
1973		
Feb. 21	Filed defendant New England Telephone & Telegraph Company's motion to compel discovery.	27.
Mar. 20	Filed Notice of Pretrial Conference.	28.
Apr. 9	" Pltf's Interrogatories to Defts. & Third-party Defts.	29.
" 11	" Third-party Deft. Central Vt. Public Service Corp.'s Motion for Judgment on the Pleadings, Motion for Vacating Third-party Complaint and Motion for Severance.	30.
" 26	" Answer of Deft. Rutland Cable T.V., Inc. to Pltf's Interrogatories.	31.
May 3	Filed Third-Party Deft. Central Vt. Public Service Corp.'s Memorandum of Law.	32.
" "	Filed Deft. Osmose Wood's Interrogatories to Pltf.	33.
" "	In Court before Judge Holden, and in Chambers. Theodore Corsones, Esq. for Pltf.; Lawrence Miller, Esq. and Richard Hill, Esq. for Osmose Wood; Douglas Pierson, Esq. and Richard Wadhams, Esq. for Deft. New England Tel & Tel Co.; James Villa, Esq. for Central Vt. Public Ser. Corp.; Fletcher Joslin, Esq. for Rutland Cable TV, Inc.	
" "	Pre-trial Conference and Hearing on Deft. New Eng. Tel & Tel Co.'s motion to compel discovery; and on 3rd party Deft. Central VT Public Ser. Corp.'s Motion for Judgment on the pleadings, Motion for vacating 3rd party complaint and motion for severance.	
" "	Filed Deft. New Eng Tel & Tel Co's motion to add party Pltff.	34.
" "	" Proposed pre-trial order memorandum of contentions.	35.
" "	Court announced his brother is Director of Central Vt. Public Ser. Corp. and request counsel to notify Clerk if they have objection to his (Judge Holden) trying case.	✓
" "	Counsel consenting, it is	
" "	ORDERED: That Central Vt. Public Ser. Corp.'s motion for judgment on pleadings will be decided on memorandum and briefs filed, New Eng. Tel & Tel Co to have 20 days to file memorandum and Central Vt. Public Ser. Corp. has 10 days to file reply briefs.	
May 23	Filed NETT's Memorandum of Law.	36. ✓
" 29	" Deft. Osmose Wood Preserving Co. of America's Answers to Pltf's Interrogatories.	37. ✓
June 8	" Third-party Deft. Central Vt. Public Service Corp's. Memorandum of Law.	38. ✓
1973		
July 3	Filed New England Telephone and Telegraph Company's reply Memorandum of Law.	39. ✓

DATE 1973	PROCEEDINGS	Date Order or Judgment Note
ıg. 3	Filed Opinion and Order -- If trial of the main action establishes liability on the part of NET to the plaintiff Sharp, the third party action will proceed to trial on the issue of CV's liability to indemnify NET under Article XIII of the Joint Use Agreement of 1929. Mailed copy to attorneys.	40.
" 31	" Deft. New England Telephone's Interrogatories of Rutland Cable TV, Inc.	41.
ept. 20	" Deft. N. E. Telephone's Motion for Joinder under Rule 17 (a).	42.
" "	" Third-Party Deft. Rutland Cable T.V., Inc.'s Answer to Deft. N. E. Telephone's Interrogatories.	43.
ct. 1	In Chambers before Judge Holden, hearing on Defendant New England Telephone and Telegraph Co.'s motion for joinder under Rule 17(a). Lawrence Miller, Esq. for Deft. Osmose; Douglas Pierson, Esq. for Deft. N.E.T & T;	
"	Statements made to Court by Mr. Pierson in support of motion and moves for time to submit memorandum, and opposed case being put over to Rutland Term.	
" "	Decision reserved; parties may have until October 4, 1973, to submit memorandum.	
" "	Ordered: Plaintiff's request to continue case to Rutland Term denied.	
" 4	Filed New England Tel. & Tel. Co's. Memorandum of Law.	44.
" 9	" Answers of Deft. New England Telephone to Pltf's Interrogatories.	45.
Nov. 8	Filed Order denying motion of New England Telephone and Telegraph to join Central Vermont Public Service Corp. as Plaintiff. Mailed copy to Attorneys.	46.
" 16	" Deft. New England Tel. & Tel. Co's Motion to Amend Interlocutory Order to add the statement prescribed by 28 U.S.C. Sec. 1292 (b).	47.
Dec. 3	At the Call of the Calendar before Judge Holden, Deft. New England Tel & Tel Co. waived hearing on its motion to amend interlocutory order; and the case was passed for two weeks.	
1974		
eb. 8	Filed defendant New England Tel. & Tel.'s amendment to schedule for proposed pre trial order.	48.
" 11	Trial by Jury begun before Judge Holden. Theodore Corsones, Esq., for Plaintiff. Lawrence Miller, Esq., and Richard Hill, Esq., for Defendant Osmose Wood Preserving Co. of America, Inc. Douglas C. Pierson, Esq., and Richard Wadhams, Esq., for Defendant New England Telephone & Telegraph Co.	
" "	A Jury was impaneled by the Clerk.	
" "	Ordered that one alternate Juror be drawn and one alternate Juror was drawn.	
" "	Opening statements were made to the Jury by Mr. Corsones, followed by Mr. Miller and Mr. Pierson.	
" "	C. William Mulholland, sworn by Clerk, was examined for Plaintiff.	
" 12	Trial resumed.	
" "	Out of time, with leave of Court, the following witnesses (doctors) were examined for Plaintiff: Dr. George J. Skrzypek, Dr. William Learned Peltz and Dr. Victor Joseph Pisanelli, Sr.	
" "	At the Bench, attorneys present, Court rules on certain testimony asked of Dr. Pisanelli.	
" "	C. William Mulholland was recalled and cross-examined by Mr. Pierson.	
" 13	Trial resumed.	
" "	The following witnesses, sworn by Clerk, were examined for Plaintiff:	

David G. Sharp vs. Osmose Wood [illegible] serving Co. of America, Inc. and New England Telep[illegible]ne & Telegraph Co.

D. C. 110 Rev. Civil Docket Continuation

DATE 1974	PROCEEDINGS	Date Order Judgment N
Feb. 13	Martin Adrian Rice, Lloyd G. Bucklin, Edward Francis Trombley, Peter Alton Grace and David Glenn Sharp.	
" "	Court states that record may show that the Pretrial Order that was submitted to the Court at the time of the Pretrial Conference on May 3 was not signed by the Court at that time although it is believed the Court approved it on the record. The Court will approve it as of this date and will allow Defendant New England Telephone & Telegraph Co. to amend the Pretrial Order to state its further contentions and the motion to amend the pretrial Order of February 8th is allowed.	
" 14	Trial resumed.	
" "	Court announced to Jury that parties had agreed upon terms of settlement, thereafter the Jury was excused from further consideration of the case.	
" "	In open Court, attorneys present, Mr. Corsones requests that Glenn Sharp and Caroline Sharp be appointed as guardian ad litem in this matter, not objected to by counsel for defendants.	
" "	Glenn I. Sharp, Sr., sworn by Clerk, was examined by Mr. Corsones, cross-examined by Mr. Pierson as to various issues presented to him in reaching an agreement in the case.	
" "	ORDERED: that Glenn I. Sharp, Sr. is appointed as guardian ad litem in this case and Court will enter an Order of Dismissal.	
" "	Filed Order of Dismissal. Mailed copy to attorneys.	✓
" 19	Filed Civil Subpoena to produce Document or object returned served.	49.
" "	Filed Civil Subpoena returned served.	50.
" "	Filed Civil Subpoena returned served.	51.
" "	Filed Civil Subpoena returned served.	52. ✓
" "	Filed Civil Subpoena returned served.	53. ✓
" "	Filed Civil Subpoena returned served.	54. ✓
" "	" Deft. Central Vt. Public Ser. Corp's Opposition to New England Telephone's Motion to Amend to Pre-trial Order, with Memorandum of Law attached thereto.	55. ✓
Mar. 20	Filed Notice of taking Deposition upon oral examination.	56.
" "	Filed Notice of taking Deposition upon oral examination.	57. ✓
" 28	Filed Third-Party Deft. CVPSC's Motion for Protective Order and for Pre-Trial Conference.	58. ✓
" "	Filed Memorandum of Law in support of Motion for Protective Order and for Pre-Trial Conference.	59. ✓
Apr. 5	Filed Third Party Defendant Central Vermont Public Service Corp.'s Interrogatories to Third-Party Plaintiff New England Telephone & Telegraph Company.	60. ✓
" 17	Filed Notice of Pretrial Conference as to 2nd action only, sch. for 4-26-74 at 2:00 P.M. at Rutland.	61. ✓
" 23	" Deft. Net's Motion to Amend Third-Party Complaint.	62.
" "	" Deft. Net's Memorandum in support of Motion to Amend.	63.
" 30	Filed Deft. Central Vermont Public Ser. Corp.'s Notice of opposition to Amendment of Third-Party Complaint.	64.
" "	Filed Pltff. NET's Memorandum of Law.	65.
May 1	Filed Objection of 3rd-party Deft. Rutland Cable T.V. to Deft. New Eng. Tel & Tel. Co.'s Motion to Amend 3rd-party Complaint.	66.
" "	Filed Memorandum of Law in opposition of Motion to Amend.	67. ✓
" 3	In Chambers before Judge Holden. Richard Wadhams, Esq. for Pltff.; John Dinse and James Villa, Esqs. for Deft. Central VT. Public Service Board; Peter Joslin, Esq. for Deft. Rutland Cable T.V.	68. ✓

Civ. 6502 Sharp et Osmose

DATE 1974	PROCEEDINGS	Date Order or Judgment Note
May 3	Hearing on Central Vt. Public Ser. Corp's opposition to New Eng. Tel & Tel Co's Motion to Amend to pretrial order; and on Central Vt. Public Ser. Corp's motion for protective order; and on New Eng. Tel & Tel's motion to amend third-party complaint; and for PRETRIAL CONFERENCE.	
" "	Mr. Wadhams makes statements to Court re New. Eng. Tel & Tel's motion to amend third-party complaint and states same was allowed during trial (2-13-74)	
" "	ORDERED: New Eng. Tel & Tel's motion to amend pretrial order is denied.	
" "	Mr. Villa makes statements to Court on Central Vt. Pub. Ser. Corp's motion for protective order; followed by Mr. Wadhams.	
" "	ORDERED: New Eng. Tel & Tel allowed to file memorandum re implied warranty within ten days; Deft. Central Vt. Pub. Ser. Corp may file memorandum in reply on or before 5-24-74.	
" "	Mr. Wadhams makes statements to Court re motion of New Eng Tel & Tel's motion to amend third-party complaint and moves to file an amendment to motion to amend.	
" "	Mr. Villa objects to amendment.	
" "	ORDERED: Amendment allowed.	
" "	Mr. Joslin for Rutland Cable T.V. will file a motion for summary judgment shortly.	
" "	Mr. Villa makes statements to Court re Central Vt. Pub. Ser. Corp's motion for protective order.	
" "	Ruling deferred until after memorandums are filed.	
" "	Mr. Villa moves that third-party pltff New Eng Tel & Tel answer interrogatories of Central Vt. Pub. Ser. Corp.	
" "	ORDERED: Motion granted.	
" 15	Filed New England Telephone's Memorandum of Law in regard to its indemnification action against Central Vermont Public Service Corp. based upon express and implied warranty.	69.
" 31	" Deft. Central Vt. Public Service Corp's Reply Memorandum on the Issue of Warranty.	70.
July 1	" Interlocutory Order--Central Vt. Public Service Corp's Motion to Amend Third Party Complaint is granted. Mailed copy to attys.	71.
" 24	" Stipulation for Trial by Court.	72.
Aug. 22	Filed Central Vt. Public Service Corp.'s Motion to Amend, Motion for Summary Judgment, and Memorandum of Law.	73.
Sept. 20	Filed Order--Ordered that Motion of Third Party Defendant Central Vermont Public Service Corporation's motion for protective order is denied; Pre trial Conference is granted. Order of this Court filed July 1, 1974, is amended to read as follows: "Ordered that New England Telephone and Telegraph Co.'s motion to amend their Third Party Complaint is granted." By Direction of Court. Mailed copy to Attys.	74.
" 23	Filed Notice of Pretrial Conf. sch. 10-18-74, 9:30 AM, Rutland.	75.
" 24	" Notice of Taking Deposition upon Oral Examination of Hazen E. Spaulding.	76.
" "	" Notice of Taking Deposition upon Oral Examination of a Central Vt. Public Serivce Corp. employee.	77.
" 25	Filed Deft. Central Vt. Public Service Corp.'s Request to Produce.	78.
Oct. 4	Filed Plaintiff New England Tel & Tel's Request to Produce.	79.
" 15	Filed NET's Memorandum of Law in response to Central Vermont's Motion to amend its Answer.	80.

Civ. 6502 Sharp vs. Osmose

D. C. 110 Rev. Civil Docket Continuation

DATE 1974	PROCEEDINGS	Date Order Judgment N
Oct. 15	Filed NET'S Memorandum of Law in Response to CV's Motion for Partial Summary Judgment.	81.
" 17	Filed Affidavit in support of the facts alleged in NET Memorandum of Law dated 10-14-74.	82.
" 18	Filed Reply Memorandum of Law in Support of Central Vermont Public Service Corporation Motion to Amend.	83.
" "	Filed Defendant Central Vermont Public Service Corporation's Supplemental Motion for Partial Summary Judgment and Supplemental Memorandum of Law.	84.
" 18	In Chambers before Judge Holden. Richard H. Wadhams, Esq. for Plaintiff. John Dinse, Esq., and James Villa, Esq., for Defendant Central Vermont Public Service Corporation. Peter Joslin, Esq., for Defendant Rutland Cable T. V., Inc.	
" "	Hearing on Defendant Central Vermont Public Service Corporation's Motion for partial summary Judgment and Motion to Amend its Answer.	
" "	Statements made to Court by Mr. Dinse in support of his motions; objected to by Mr. Wadhams.	
" "	ORDERED: Parties have ten days to file additional memorandum under Section 224, Title 21.	
" "	Decision reserved.	
Nov. 4	Filed Memorandum of Law in Support of Central Vermont Public Service Corporations' Motion to Amend in Order to Assert a Counterclaim.	85.
" 8	Filed Request to Produce as to Deft., Rutland Cable T.V., Inc.	86.
" 19	Filed Memorandum and Order -- it is hereby ORDERED: That the motion of the third party defendant, Central Vermont, for leave to assert a counterclaim is granted and the motion of the third party defendant, Central Vermont, for partial summary judgment is denied. Mailed copy to Attorneys.	87.
Dec. 11	Filed Motion for Order Compelling Discovery.	88.
" "	" Memorandum of Law in Support of Motion for Order Compelling Discovery.	89.
" 19	Filed Judge Holden's Notice of Disqualification.	90.
1975 Jan. 2	Filed Order on Request to Produce and Motion for Order Compelling Discovery. Mailed copy to attys.	91.
Feb 4	Filed Civil Subpoena - Frank Butkovich returned served.	92.
Feb 5	Trial by Court begun before Judge Oakes as to Third Party Action. Douglas C. Pierson, Esq. and Richard H. Wadhams, Esq. for plff.: John Dinse, Esq. for Deft. Central Vermont. Fletcher Joslin, Esq. and Peter Joslin, Esq. for Deft. Rutland Cable.	
" "	Filed NET'S motion re CV's leave to file counterclaim.	93.
" "	A discussion was held between Court and Counsel as to un-filed answers by defts. to counterclaim.	
" "	ORDERED: Defendants may file an answer during course of hearing and grants parties time to file memorandums.	
" "	The following witnesses sworn by Clerk were examined for plaintiff: David G. Sharp and Frank D. Butkovich.	
" "	The following witnesses sworn by Clerk were cross examined for plaintiff: Hazen Spaulding and C. William Mulholland.	
" "	Filed CV's Counterclaim	94
" "	" Defendant Central VT's answer to amended complaint.	95
" 6	Filed answer of Third Party defendant to amend third party complaint.	96.

(see over)

DATE 1975	PROCEEDINGS	Date Or Judgment
Feb.6	Trial resumed.	
" "	The following witnesses sworn by Clerk were cross examined for plaintiff: Frank Cross Weidman and Charles E. Berry.	
" "	Martin A. Rice sworn by Clerk was examined for Plaintiff.	
" "	At 11:30 AM defendant NET rests.	
" "	Hazen Spaulding was recalled and examined by Mr. Dinse.	
" "	The following witnesses sworn by Clerk were examined for Deft. Central Vt. by Mr. Dinse: Anthony Edward Fusco; Charles Anthony Whitehair; Charles E. Berry (re-called). At 3:15 Deft. CV rests.	
" "	The following witnesses sworn by Clerk were examined for Deft. Rutland Cable by Mr. Joslin: Henry Joseph Poplaski and James Leslie Morgan.	
" "	At 3:55 PM Rutland Cable TV rests.	
" "	Evidence Closed.	
" "	Taken under advisement.	
Mar. 17	Filed Findings of Fact, Conclusions of law and opinion -- Complaint against Cable TV is dismissed. Judgment is for Telco against CV for $ 70,000.00 together with interest at the legal rate from the time of payment of $ 50,000.00 to David Sharp and of $ 20,000.00 to Telco, and costs. Parties to settle judgment order on or before 10 days from filing hereof. Copy mailed to attys.	97.
" 24	Filed New Eng. Tel's Bill of Costs.	98.
Apr. 2	Plaintiff N.E.T. & T.'s Costs taxed and allowed at $221.84. Attorneys notified.	
" 8	Filed Judgment on Decision by the Court--Judgment is hereby entered on the Findings of Facts, Conclusions of Law and Opinion issued on March 14, 1975 by James L. Oakes, sitting by designation as U. S. District Judge, for the plaintiff to recover from defendant Central Vermont Public Service Corporation the following:	
	(a) plaintiff's payment to David Sharp $50,000.00	
	(b) Interest at 7.5% on said payment from March 25, 1974 3,893.50	
	(c) Attorneys' fees and disbursements paid by plaintiff to Pierson, Affolter & Amidon 20,000.00	
	(d) Interest at 7.5% on said payments as follows:	
	(i) from November 18, 1972 on $765. 135.87	
	(ii) " January 27, 1973 on $490. 80.60	
	(iii) " July 14, 1973 on $2,930. 380.72	
	(iv) " March 30, 1974 on $9,650. 743.52	
	(v) " January 27, 1975 on $6,165. 90.92	
	(e) Costs as stated in Bill of Costs 221.84	
	TOTAL $75,546.97	
	It is further ordered and Adjudged that plaintiff's complaint against defendant Rutland Cable T. V. Inc. is marked "Dismissed with Prejudice. Mailed copy to Attys.	99.
Apr. 29	Filed Deft. Central Vt. Public Service Corp's Notice of Appeal. Mailed copy to Dinse Allen & Erdmann, Esqs., Pierson, Affolter & Amidon, Esqs., Theriault & Joslin, Esqs., Judge Oakes, Court Reporter, and Clerk, U. S. Court of Appeals for the Second Circuit, N.Y., N.Y.	100
May 15	" Stipulation that "Counterclaim of Central Vt. Public Service Corp. against New Eng. Tel. & Tel. Co. is marked Dismissed" be added to Judgment dated 4-8-75.	101.

(see next pg.)

DATE 1975	PROCEEDINGS	Date Orde Judgment N
May 19	Upon consideration of Stipulation that "Counterclaim of Central Vt. Public Service Corp. against New Eng. Tel. & Tel. Co. is marked Dismissed" be added to Judgment dated 4-8-75, it is	
" "	ORDERED: Granted. Mailed copy to attys.	
June 4	Mailed Record on Appeal to Clerk, U. S. Court of Appeals for the Second Circuit, N.Y., N.Y.	
" 18	Filed Transcript of Trial by Court held February 5 & 6, 1975.	102
" "	Mailed Supplemental Record on Appeal to Clerk, U. S. Court of Appeals for the Second Circuit, N.Y., N.Y.	

1929 AGREEMENT

This agreement, made this First day of April, 1929 by and between the Central Vermont Public Service Corporation a corporation of the State of Vermont hereinafter called the "Electric Company", party of the first part, and the New England Telephone and Telegraph Company a corporation of the State of New York hereinafter called the "Telephone Company", party of the second part.

* * *

ARTICLE IV

ERECTING, REPLACING OR RELOCATING POLES

(a) Whenever any jointly used pole, or any pole about to be so used under the provisions of this agreement, is insufficient in size or strength for the existing attachments and for the proposed immediate additional attachments thereon, the Owner shall promptly replace such pole with a new pole of the necessary size and strength and make such other changes in the existing pole line in which such pole is included, as the conditions may then require.

* * *

ARTICLE VIII

MAINTENANCE OF POLES AND ATTACHMENTS

(a) The Owner shall, at its own expense, maintain its joint poles in a safe and serviceable condition, and in accordance with the attached specifications

marked Exhibit "A" and shall replace, subject to the provisions of Article IV, such of said poles as become defective. . . .

* * *

ARTICLE XIII

LIABILITY AND DAMAGES

Whenever any liability is incurred by either or both of the parties hereto for damages for injuries to the employees or for injury to the property of either party, or for injuries to other persons or their property, arising out of the joint use of poles under this agreement, or due to the proximity of the wires and fixtures of the parties hereto attached to the jointly used poles covered by this agreement, the liability for such damages, as between the parties hereto shall be as follows:

1. Each party shall be liable for all damages for such injuries to persons or property caused solely by its negligence or solely by its failure to comply at any time with the specifications herein provided for; provided that construction temporarily exempted from the application of said specification under the provisions of section (b) of Article VIII shall not be deemed to be in violation of said specifications during the period of such exemption.

2. Each party shall be liable for all damages for such injuries to its own employees or its own property that are caused by the concurrent negligence of both parties hereto or that are due to causes which cannot be traced to the sole negligence of the other party.

3. Each party shall be liable for one-half (1/2) of all damages for such injuries to persons other than employees of either party, and for one-half (1/2) of all damages for such injuries to property not belonging to either party that

are caused by the concurrent negligence of both parties hereto or that are due to causes which cannot be traced to the sole negligence of the other party.

4. Where, on account of injuries of the character described in the preceding paragraphs of this article, either party hereto shall make any payments to injured employees or to their relatives or representatives in conformity with (1) the provision of any workman's compensation act or any act creating a liability in the employer to pay compensation for personal injury to an employee by accident arising out of and in the course of the employment, whether based on negligence on the part of the employer or not, or (2) any plan for employees' disability benefits or death benefits now established or hereafter adopted by the parties hereto or either of them, such payments shall be construed to be damages within the terms of the preceding paragraphs numbered 1 and 2 and shall be paid by the parties hereto accordingly.

5. All claims for damages arising hereunder that are asserted against or affect both parties hereto shall be dealt with by the parties hereto jointly; provided, however, that in any case where the claimant desires to settle any such claim upon terms acceptable to one of the parties hereto but not to the other, the party to which said terms are acceptable may, at its election, pay to the other party one-half (1/2) of the expense which such settlement would involve, and thereupon said other party shall be bound to protect the party making such payment from all further liability and expense on account of such claim.

6. In the adjustment between the parties hereto of any claim for damages arising hereunder, the liability assumed hereunder, by the parties shall include in addition to the amounts paid to the claimant, all expenses incurred by the parties in connection therewith, which shall comprise costs, attorneys' fees, disbursements and other proper charges and expenditures.

* * *

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

David G. Sharp

v.

Osmose Wood Preserving Co. of America, Inc., and New England Telephone and Telegraph Company

Civil action
File No. 6502

OPINION AND ORDER

The plaintiff in the main action, David G. Sharp, on February 16, 1970, while in the employ of Central Vermont Public Service Corporation (CV), sustained the injuries for which he seeks recovery in this action of negligence. The plaintiff was working as a lineman and, according to his complaint was injured when the wooden utility pole he had climbed broke at ground level and toppled to the ground. It was stipulated at pretrial conference that the pole was rotted through at the place of the break. The pole jointly served as a facility for his employer CV and the defendant New England Telephone and Telegraph Company (NET). The pole was installed by CV in 1955. However, at the time of the accident the pole was owned by the defendant NET. The telephone company acquired ownership of this part of its distribution plant by way of a sale from CV in 1961. In 1964 NET entered into a contract with the defendant Osmose Wood Preserving Company (Osmose), referred to as the 1964 Annual Pole Inspection and Treatment Contract for the inspection and maintenance of the pole.

In March 1970 the plaintiff was awarded and recovered benefits under the Vermont Workmen's Compensation Law for the injuries arising in the course of his employment with CV. Thereafter he commenced this action in negligence against NET and Osmose.

NET filed a third party complaint against CV. This complaint is founded on three different theories. First, it alleges breach of express and implied warranties in the sale of the pole. The second phase of the complaint alleges negligent installation, control and maintenance of the injuring agency. The third aspect of NET's claim against CV alleges a contract of indemnity composed in agreement of 1929 between the parties concerning the joint use of utility poles between these electric and telephone companies.

CV, as third party defendant, moved for judgment on the pleadings under Rule 12(c), Fed R. Civ. P., and later enlarged the scope of its original motion to request summary judgment be entered in its favor under Rule 56, Fed. R. Civ. P.

The principal action by the injured employee of CV is maintained by virtue of 21 V.S.A. Section 624, amended by 1959, No. 232.1/

Although the Supreme Court of Vermont has not dealt with the problem, it is the generally accepted rule that, absent express statutory authorization, an employer whose concurring negligence contributed to the employee's injury cannot be held to respond to his joint tort feasor. See Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 342 U.S. 282, 285 (1952); American Mutual Liability Ins. Co. v. Matthews, (2d Cir. 1950), 182 F.2d 322. See also 18 Am. Jur. 2d Sections 47,48; annotations, 60 A.L.R. 2d 1384 and 53 A.L.R. 2d 979. The reason for the rule is that the employer is

not liable in tort to his employee and hence cannot be treated as a joint tort feasor. 2A Larson Workmen's Compensation Law Section 75.21.

NET's claim for breach of express and implied warranties that the pole was fit for the general and specific purposes for which it was intended appears insubstantial. The Uniform Sales Act, in effect at the time when NET acquired ownership of the utility pole, provided that " -- there is no implied warranty or condition as to quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale. If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed....." 9 V.S.A. Section 1515(3).

According to the 1929 agreement for the joint use of the utitlity poles, and as owner of the pole that is the subject of this litigation, NET, as its owner, was required "at its own expense to maintain its joint poles in a safe and serviceable condition." In the absence of guilty knowledge on the part of the seller, inspection or the opportunity for it precludes the warranty even though the defect may be latent. 1 S. Williston, Sales Section 234 (3d Ed.). See Badger v. Whitcomb Bros., 66 Vt. 125, 128 (1894).

Moreover, as Professor Williston points out, the typical warranty, being an undertaking regarding the quality of goods at the time of sale must, if ever broken, be broken at that time: and the statute of limitations, therefore, begins to run immediately. Williston, Sales, supra, Section 212a.

The duty of NET to maintain the pole in a safe and serviceable condition, of course, included the duty of reasonable inspection. This is implicit in its obligation to protect third persons from harm arising from its use and maintenance. In the face of these affirmative duties, it cannot be said as a matter of law that no active fault resided in NET as the owner of the in-

juring agency within the doctrine stated by Judge Leddy in Viens v. Anthony Company (D. Vt. 1968), 282 F. Supp. 983. In the presence of its continuing duty of safe maintenance, and absent an implied warranty of fitness, the NET third party complaint fails to state a valid claim for implied indemnity within the rule of Quality Market v. Champlain Valley Fruit Co.,127 Vt. 562, 565 (1969).

There remains the final question of whether the Joint Use Contract imposes an express obligation on CV to indemnify NET for any liability it may incur for any injuries sustained by the plaintiff Sharp while at work for CV on February 16, 1970. NET directs us to Article XIII of that agreement which states impertinent provision:

LIABILITY AND DAMAGES

> Whenever any liability is incurred by either or both of the parties hereto for damages for injuries to the employees or for injury to the property of either party, for injuries to other persons or their property, arising out of the joint use of poles under this agreement, or due to the proximity of the wires and fixtures of the parties hereto attached to the jointly used poles covered by this agreement, the liability for such damages as between the parties hereto, shall be as follows:
>
> 1. Each party shall be liable for all damages for such injuries to persons or property caused solely by its negligence or solely by its failure to comply at any time with the specifications herein provided for; provided that construction temporarily exempted from the application of said specification under the provisions of section (b) of Article VIII shall not be deemed to be in violation of said specifications during the period of such exemption.
>
> 2. Each party shall be liable for all damages for such injuries to its own employees or its own property that are caused by the concurrent negligence of both parties hereto or that are due to causes which cannot be traced to the sole negligence of the other party.
>
> 3. Each party shall be liable for one-half (1/2) of all damages for such injuries to persons other than employees of either party, and for one-half (1/2) of all damages for such injuries to property not belonging to either party that are caused by the concurrent negligence of both parties hereto or that are due to causes which cannot be traced to the sole negligence of the other party.

4. Where, on account of injuries of the character described in the preceding paragraphs of this article, either party hereto shall make any payments to injured employees or to their relatives or representatives in conformity with (1) the provision of any workmen's compensation act or any act creating a liability in the employer to pay compensation for personal injury to an employee by accident arising out of and in the course of the employment, whether based on negligence on the part of the employer or not, or (2) any plan for employees' disability benefits or death benefits now established or hereafter adopted by the parties hereto or either of them, such payments shall be construed to be damages within the terms of the preceding paragraphs numbered 1 and 2 and shall be paid by the parties hereto accordingly.

When this contract was written the statute upon which the main action is brought had not been enacted. Prior to 1959 the Workmen's Compensation Law made acceptance of benefits under the act a bar to any other action by the employee for the injuries he sustained. A third party wrongdoer could be held to respond only to the employer's subrogated right. Dubie v. Cass-Warner Corp., 125 Vt. 476, 477 (1966). Thus No. 232 of the Acts of 1959 afforded the plaintiff a remedy and created rights and remedies which were not within the contemplation of the parties to the Joint Use Agreement when the joint use agreement was made in 1929.

There is a present ambiguity in the contract. The conduct and the course of dealing between the parties over the life of the contract may have supplied the omission, or perhaps changed the construction which the court must give to their undertaking, in a manner different from the initial intention expressed in the contract as first written. H. P. Hood & Son v. Helms, 124 Vt. 331, 336 (1964); Soulia v. Farmers Co-op Fire Insurance Co. 113 Vt. 382, 387 (1943); Gray v. Bellows Falls Ice Co. 108 Vt. 190, 194 (1936).

The contract, as it relates to the indemnity claim, speaks of sole and concurrent negligence of the respective parties. All of these considerations concern issues of fact that remain unresolved in the record as now composed. NET's third party claim of express indemnity deals with problems that can only be determined after trial. In the presence of questions of the intention

of the parties to the agreement and unresolved issues of concurring negligence, summary judgment is an inappropriate vehicle to resolve the controversy. 10 C. Wright and A. Miller. Federal Practice and Procedure, Section 2730. CV's motion for summary judgment on this aspect of the third party complaint must be denied. The court sees no good cause to encumber the injured plaintiff's negligence action with complicated questions of contract and indemnity presented by the additional claims in the third party action. The plaintiff employee should be afforded the opportunity to preserve his statutory remedy against those he claims produced his injury without the complications which attend the indemnity controversy between his employer and the owner of the instrument which brought about his downfall. A. Larson, Workmen's Compensation Law, Section 76.41. CV's motion for a separate trial of NET's third party complaint will be granted. Rule 42 (b), Fed. R. Civ. P.

If trial of the main action establishes liability on the part of NET to the plaintiff Sharp, the third party action will proceed to trial on the issue of CV's liability to indemnify NET under Article XIII of the Joint Use Agreement of 1929.

It is so ORDERED.

DATED at Bennington, in the District of Vermont, this 2nd day of August, 1973.

s/ James S. Holden
James S. Holden
Chief Judge

Endorsed: Filed August 3, 1973
Leonard W. Lafayette
Deputy Clerk

FOOTNOTES

1/ Where the injury for which compensation is payable under the provisions of this chapter was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies, but the injured employee or his personal representative may also proceed to enforce the liability of such third party for damages in accordance with the provisions of this section. If the injured employee or his personal representative does not commence the action within one year after the occurrence of the personal injury, then the employer or its compensation insurance carrier may, within the period of time for the commencement of actions prescribed by statute, enforce the liability of the third party in the name of the injured employee or his personal representative. Not less than thirty days before the commencement of suit by any party under this section, the party shall notify, by registered mail at their last known address, the commissioner of industrial relations, the injured employee, or in the event of his death, his known dependents, or personal representative or his known next of kin, his employer and the workmen's compensation insurance carrier. Any party in interest shall have a right to join in the suit but the direction and control of said suit shall be with the injured plaintiff.

....

In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workmen's compensation insurance carrier for any amounts paid or payable under this chapter to date of recovery, and the balance shall forthwith be paid to the employee or his dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits.

COVENANT-NOT-TO-SUE

This Covenant-Not-To-Sue is executed by David Sharp and Glen Sharp of Rutland, Vermont in favor of New England Telephone and Telegraph Company, a New York corporation with principal office in Boston, Massachusetts ("NET" herein) under the following circumstances and for the following considerations:

Whereas, David Sharp received severe personal injuries on February 16, 1970 when a utility pole upon which he was working during the course of his employment by Central Vermont Public Service Corporation ("CVPSC" herein) toppled and fell to the ground; and

Whereas, David Sharp instituted an action in United States District Court for the District of Vermont in which he alleged that NET "owned and had under its control and area of responsibility" the foregoing utility pole which supported the power line of CVPSC and in which he sought to hold NET liable for his injuries on the basis of alleged passive negligence on its part; and

Whereas, in a February, 1972 deposition David Sharp testified that his employer, CVPSC, was guilty of active negligence which caused or contributed to the cause of subject accident; and

Whereas, NET denied that it had been guilty of any negligence, active or passive, and affirmatively alleged that subject accident was caused by the active negligence both of David Sharp and of other employees and agents of CVPSC and also by the active negligence of Rutland Cable TV, Inc.; and

Whereas, in recognition of the fact that there was some merit to NET's foregoing defenses, David Sharp agreed after three days of trial to accept the sum of $50,000 from NET in consideration of this Covenant-Not-To-Sue; and

Whereas, in negotiations the parties litigant recognized that David Sharp's damage claim was such that, but for the liability dispute, his claim against NET would have had a value substantially in excess of $50,000; and

Whereas, David Sharp agreed to accept this compromise figure solely by reason of the liability problems involved in his case against NET; and

Whereas, the parties have reached an understanding whereby NET shall indemnify David Sharp against any subrogation claim of CVPSC for recovery of workmen's compensation benefits paid by it previously hereto to and on behalf of David Sharp and David Sharp

shall indemnify NET against any subrogation claim of CVPSC for recovery of workmen's compensation benefits so paid by it subsequent hereto and desire to record said understanding herein; and

Whereas, on February 14, 1974 the Federal Court appointed Glen Sharp guardian-ad-litem of his son, David Sharp.

Now therefore in consideration of the sum of $50,000 receipt whereof is hereby acknowledged by David Sharp, David Sharp and Glen Sharp, for themselves and their heirs, representatives and assigns, hereby covenant and agree never to make any demand or claim or commence or cause or permit to be prosecuted any action at law or in equity, or any proceeding of any description, against NET because of personal injury, disability, property damage, loss of service, expense or loss of any kind that David Sharp has sustained or may hereafter sustain in consequence of subject accident.

To procure payment of said sum David Sharp and Glen Sharp hereby declare that no representations about the nature and extent of said injuries, disabilities or damages made by any physician, attorney or agent of any party to whom this Covenant extends, nor any representations regarding the nature and extent of legal liability or financial responsibility of any of the parties to whom this Covenant extends, have induced them to make this Covenant; that in determining said sum there has been taken into consideration not only the ascertainable injuries, liabilities and damages, but also the possibility that the injuries sustained may be permanent and progressive and recovery therefrom uncertain and indefinite, so that consequences not now anticipated may result from subject accident; and that this Covenant shall apply to all unknown and unanticipated injuries and damages resulting from subject accident, casualty or event, as well as to those not disclosed.

David Sharp and Glen Sharp record their understanding that NET admits no liability of any sort by reason of subject accident and that the payment above recited is made to terminate further controversy respecting all claims for damages that David Sharp has heretofore asserted or that he or his personal representatives might hereafter assert against NET because of subject accident.

It is a condition of this Covenant-Not-To-Sue that NET shall indemnify David Sharp and Glen Sharp and each of them and hold them harmless from and against all claims which CVPSC might assert against either of them for recovery of all sums paid by CVPSC to and on behalf of David Sharp or Glen Sharp pursuant to the Vermont Workmen's Compensation Law by reason of the injuries received by David Sharp in subject accident. It is the purpose of this condition to insure that David Sharp and Glen Sharp receive the foregoing $50,000 free and clear of any subrogation claims which CVPSC might assert against either of them for recovery of any and all such workmen's compensation benefits which CVPSC has paid to the date of these presents.

As a further consideration and inducement for this Covenant, David Sharp and Glen Sharp hereby agree and promise to indemnify NET and hold it harmless from and against all claims which CVPSC may assert against NET for recovery of any sums which CVPSC might hereafter be obligated to pay to and on behalf of David Sharp or Glen Sharp pursuant to the Vermont Workmen's Compensation Law by reason of the injuries received by David Sharp in subject accident. It is the purpose of this paragraph to insure that only actual obligation which NET has assumed by reason of the premises is the payment of $50,000 to David Sharp and the only contingent obligation which NET has assumed is the possible payment to CVPSC, provided CVPSC can establish its entitlement thereto, of the aforesaid workmen's compensation benefits which CVPSC has paid to the date hereof.

Signed and sealed this 14th day of February, 1974.

Witnessed By:

s/Theodore Corsones

s/David Sharp

s/Nicole S. Sweet

s/Glenn I. Sharp, Sr.

STATE OF VERMONT
RUTLAND COUNTY, SS

At Rutland in said County on this 14th day of February, 1974, before me personally appeared David Sharp and Glen Sharp to me known to be the persons who executed the foregoing Covenant-Not-To-Sue and they acknowledged that they executed the same as their free act and deed.

s/Theodore Corsones
Notary Public

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

New England Telephone
& Telegraph Co.

v.

Central Vermont Public Service Corp.
and Rutland Cable TV, Inc.

Civil Action
File No. 6502

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

David Sharp, an employee of Central Vermont Public Service Corp. (CV) was seriously injured on February 16, 1970, while in the process of doing his work as a third class lineman for CV on a pole owned by New England Telephone & Telegraph Co. (Telco) as a result of the pole's failing. Having climbed the pole, hereinafter designated as X-1, he was pulling up a de-energized primary line being strung from Pole X-1 to a Pole 17, according to testimony of C. William Mulholland who was then working on the ground. Pole X-1 contained near the ground line interior rot which was not visible nor readily detectable either by the eye or by a person with David Sharp's experience using his company-prescribed sounding test, i.e., hitting the pole several times with a wrench or hammer at or near the ground line. Pole X-1 was owned by Telco. Although not using the pole Telco as owner was required under contract to maintain and inspect it. The pole was used by CV and had one Rutland Cable TV (Cable TV) attachment. This action is one for indemnity by Telco for $50,000 paid in connection with a settlement upon a covenant not to sue after David

Sharp brought an action against Telco and Osmose Preserving Co., a contractor which performed inspection and treatment of utility poles for both CV and Telco, plus attorneys' fees and expenses of $20,043.57. Also involved is a counterclaim by CV against Telco for its Workmen's Compensation payments made to David Sharp and attorneys' fees in connection with this suit. Detailed findings as to the history of the pole, the events on the date of the accident and the dealings among the parties follow.

FINDINGS OF FACT

1. Pole X-1, the first pole on Roberts Avenue west of North Main Street in Rutland, Vermont, was originally installed by CV in 1955.

2. It was a western red cedar pole which was treated or inpregnated with preservative.

3. It came from the stock of poles of CV and was newly installed in the Roberts Avenue location at that time.

4. The location is on an incline sloping down from east to west.

5. The pole with cross arms was installed with approximately 5 1/2 feet of the butt inserted in the ground and the remaining 30 feet in the air, on the plumb, that is, not at an angle.

6. The pole constituted a dead end for CV's electric service on Roberts Avenue, the "feed," i.e., the flow of electricity, on Roberts Avenue being from west to east.

7. There was originally no CV line attachment from Pole X-1 to Pole 17, the closest North Main Street pole, one which carries north-south electric, telephone and cable TV service.

8. Pole X-1 carried three CV primary conductors or wires, i.e., two energized primary wires and one neutral wire, as well as three secondary CV

conductors, all also running to Pole 1, the next pole westerly on Roberts Avenue and deadending on Pole X-1

9. Since the tension on Pole X-1 was from the west, a head guy was installed running from the pole more or less in a straight line to the east across North Main Street to an elm tree about 30 inches in diameter; this head guy exerted a contrary tension.

10. No other guys, support wires or braces were used in connection with Pole X-1.

11. Pole X-1 was one of 527 joint use CV-owned poles in a Telco maintenance area transferred in ownership to the telephone company at some time between August 18, 1961, when Exhibit 16, an instrument indicating intent to transfer, was signed, and October 21, 1963, when an exchange of billings (Exhibit 22) in the amount of $15,935.26 was made.

12. As the result of such transfer of ownership, under the agreement between Telco and CV dated April 1, 1929, relative to the joint use of wood poles located in the Rutland telephone exchange area, as amended by their agreement of September 22, 1959, taking into account a July 14, 1959, joint licensing agreement between Telco and CV as licensors and Cable TV as licensee, Telco and CV each assumed certain obligations or duties.

13. Those obligations and duties will be dealt with more specifically in the conclusions of law nereinbelow, but one is the duty of Telco to "maintain [Pole X-1]... in a safe and serviceable condition, and in accordance with [certain specifications] ... and [to] replace ... such of said poles as become defective."

14. Telco breached this duty because Pole X-1 was not in a safe and serviceable condition and was at the time of the accident defective.

15. In so doing, there is no evidence in this record, however, that Telco was negligent since the pole was not due for inspection and ground treatment until 1975 under the ordinary and regular procedures used by utility companies in New England.

16. Moreover, although the pole was defective, so long as the head guy and conductors from X-1 were maintained in place, the pole in all probability would not have fallen.

17. There is nothing to show that Telco knew or should have known that the pole was rotten or defective.

18. A duty on the part of CV under the April 1, 1929, agreement (see Article 5) was to give 90 days' notice to Telco of its contemplated change in the character of its circuits on Pole X-1 (by installing a new connection of primary circuits to Pole 17 on North Main Street, thereby changing the flow of current on Roberts Avenue to east-west).

19. This duty was breached by CV, but its breach did not cause Telco any harm and is not relied upon by Telco.

20. As mentioned, by agreement dated July 14, 1959, Telco and CV as licensors permitted Cable TV as licensee, upon application and approval, to use their poles to string its cable and messenger wire.

21. This agreement is contained in Exhibit 13 and was modified on April 27, 1961, and on February 16, 1968, as contained in Exhibit 14.

22. A TV cable was installed in 1962 running from Pole 1, the next pole westerly of Pole X-1 on Roberts Avenue to Pole X-1 and thence at a 59° agnle to the south-southeast to Pole 17 on North Main Street.

23. This cable consisted of a coaxial cable lashed by .045 lashing wire to a 109 support wire (an example contained in defendant Cable TV's Exhibit A)

and was pulled as tight as it could be pulled from Pole 1 to Pole X-1 but was given a slack line to Pole 17.

24. The cable was supported on Pole X-1 by a J bracket (which was attached to the pole by drive lags driven by a hammer) and to which the support wire was clamped.

25. The TV cable even though somewhat slack exerted some additional tension on the pole the degree of which it is impossible to reconstruct since no reliable evidence shows how slack the cable was strung from X-1 to Pole 17 in 1970.

26. There is, therefore, no showing that Cable TV was in breach of its duties under Article III(a) of the April 27, 1961, agreement or the duty under Article III(b) "to protect against ... injury or damage to persons ... including employees ... of the Licensors."

27. Cable TV did not have notice as required by Article V(a) from CV that CV was going to "make a change in the type of character of any of its attachments."

28. Under Article V(b) "Any and all changes in existing facilities including additional guying necessary by reason of proposed attachments shall be performed by the Licensors ...."

29. If Cable TV's attachment had created a dangerous condition, Cable TV did not receive any notice from the licensors (CV or Telco) that the condition should be remedied under Article V(b) or under Article VII(b).

30. The responsibility of Cable TV under Article XI(a) will be discussed below.

31. The accident to David Sharp occurred when he and C. William Mulholland

were part of a crew with Anthony E. Fusco as foreman.

32. As foreman, Fusco had the duty to make certain that David Sharp made a proper test for decay before climbing, both under Exhibit 19, the CV. Safety Instruction Manual and in light of Sharp's relative inexperience.

33. Pole X-1 could not be properly tested under Rule 11 of the "Special Instructions for Electric Line Department Employees" (Exhibit 19, p.87) requiring testing for below ground level decay by removal of dirt from around the pole because the ground was frozen.

34. However, under Rule 12 (id.) where "it is impossible to test pole due to frozen ground ... the pole must first be braced with pike poles and then temporarily guyed as required in the judgment of the foreman; moreover, "[p] ike poles must be attended if they cannot be grounded securely."

35. By not using pike poles and by not temporarily guying the pole in issue in accordance with its own safety regulations, CV was negligent.

36. While there was some testimony that pike poles, which are 14 feet long and approximately two inches in diameter, with a sharp end, could not be used because of the slope of the ground, the court does not find this to be the fact.

37. The court also finds that even if pike poles could not be used, CV was neglignet since temporary guying was possible and not used, despite the inability to make a proper test as required by the safety manual. It is apparent in Exhibit 5 that the boom truck there pictured could have been used, and there is some evidence that it was in the vicinity before the pole was climbed.

38. In any event, the court takes judicial notice that Roberts Avenue is only a few minutes away from the central offices of CV in Rutland. A

simple phone call could have made such a truck available.

39. The pole could have been stabilized by securing it to the truck boom.

40. In short, extra precautions before climbing the pole were required because there had to have been doubt as to the condition of the pole below ground, both because the age of the pole was evident from the degree of weathering and numerous spur marks and also because the ground was frozen.

41. CV's negligence is in no way diminished by the fact that on the preceding Friday, February 13, as testified to by Mr. Fusco, another person had safely climbed Pole X-1 to install some hardware preparatory to the job that was to be done on Monday by the Sharp-Mulholland crew.

42. The only strain on the pole on Friday, February 13, was from the man climbing whereas the strain to be imposed on the pole on Monday, February 16, would include a replacement of the head guy by an anchor guy and a connection -- even if on a "slack span" basis -- of primary wires from Pole X-1 to Pole 17.

43. With the Cable TV line which, whether or not slack, created a corner stress and with a new guying situation plus new conductors leading from X-1 to Pole 17 and no way to offset that slack span from X-1 to Pole 17 by a guy because it would have to be in the street, it was negligent not to take measures to support Pole X-1 with the boom truck.

44. Additional proof of the stresses on this pole lies in the fact that the replacement pole for X-1 now in the ground leans toward Pole 17, permitted to do so intentionally but nevertheless pointing out the stress or tension toward the south with no offsetting guy.

45. Temporary support at the time of the accident was essential.

46. In fact, when David Sharp did climb Pole X-1, even though the

anchor guy was properly installed so as at least to offset the tension from the primary and secondary conductors from Pole 1 (if not to offset the Cable TV or other tensions from the new installation to Pole 17), the head guy was cut under orders of Foreman Fusco after specific query of him by David Sharp.

47. This cutting of the head guy across North Main Street caused Pole X-1 to vibrate despite the tightened new anchor guy and was a sign that Pole X-1 was under some additional stress not wholly taken up by the new anchor guy.

48. Even at that point the accident could have been avoided if pike poles and temporary guying had been used. While it was not until some 20 minutes after the head guy was cut that the pole fell and David Sharp was injured, it was as a result of the additional stresses on the pole both from the TV cable and from the new connection being drawn up to Pole 17.

49. It was precisely during the pulling up of the de-energized primary line being strung from Pole X-1 to Pole 17 around the shoe on the crossarms that, in combination with David Sharp's additional weight leaning toward the southeast and reaching out toward the crossarm, the pole fell in a generally southerly direction as indicated in the photographs.

50. As previously found, the pole contained interior rot which was not visible nor readily detectable.

51. While the pole might have evidenced some exterior rot according to the testimony of the witness Frank E. Butkovich while examining a photograph showing the pole and butt, this exterior rot was not visible to David Sharp at the time of the accident.

52. Since Sharp was an inexperienced lineman and subject to Fusco's orders, even though Sharp was also required to be familiar with the [illegible] pages of safety instructions in his Safety Instruction Manual, he would have

been no more than 10 per cent responsible for the accident by virtue of his own contributory negligence in failing to insist that the Safety Instruction Manual be followed.

53. A jury might have found Sharp not contributorily negligent in any respect because Rule 12(a) uses the language "as required in the judgment of the foreman."

54. CV paid David Sharp temporary total disability payments of $8,000 including medical and hospital payments under its own self-insured Workmen's Compensation responsibility; in all probability a claim for permanent disability will be filed and paid but in an amount unascertainable and purely speculative at the present time.

55. CV reasonably paid $7,250 in services and expense to Messrs. Dinse, Allen & Erdmann for their legal work in connection with this case consisting of in excess of 200 hours at a rate of approximately $35 per hour.

56. Telco reasonably paid $20,000 of attorneys' fees and disbursements to Messrs. Pierson and Wadhams for their legal services at the rate of $40 per hour for approximately 500 hours of services in connection with the defense of David Sharp's original suit against Telco and the preparation of this indemnity suit and defense of the CV counterclaim.

57. These findings as to legal services are based upon the court's examination of the 90 documents in the file, the numerous memoranda of law prepared on the part of all parties, the motions and hearings thereon, the discovery had by the parties, the complexities of the original suit, indemnity claim and counterclaim, the difficulty of the services performed on all sides and the manner of presentation of the case as set forth in the file.

58. Such charges are reasonable for the Rutland and Burlington, Vermont

area of legal practice and would indeed be substantially higher were they incurred in, e.g., the city of New York.

CONCLUSIONS OF LAW

The court finds that neither Telco nor Cable TV was negligent in connection with David Sharp's accident. The court finds that CV was negligent and that its negligence contributed 100 per cent to cause the accident, although a jury might have found that David Sharp was between 0 and 10 per cent contributorily negligent. Any contributory negligence of David Sharp is wholly discounted since he was an employee of CV in this indemnity suit. Telco did not pay Sharp as a volunteer since Telco had contractual duties running to Sharp as a third party beneficiary. These included the duties of inspection, maintenance and providing a safe pole, none of which Telco performed, even though there is no showing here that it was negligent in failing to perform those contractual duties. Telco may not recover against CV as a joint tortfeasor, Howard v. Spafford, 132 Vt. 434, 321 A.2d 74 (1974), except upon either an express indemnification provision in the contract, Spaulding v. Oakes, 42 Vt. 343 (1869), or on the basis that it was CV's active negligence, see Viens v. Anthony Co., 282 F. Supp. 983 (D. Vt. 1968), rather than Telco's passive breach of duty which caused the accident. See also Farr v. J. Scanlon Co., 441 F.2d 1090 (2d Cir. 1971). CV did not breach any express or implied warranties to Telco in connection with the sale or transfer of the pole. Were CV not an employer who had paid its employee workmen's compensation under the Vermont Workmen's Compensation Law, 21 V.S.A. S. 601 et seq., and hence entitled to the benefits of 21 V.S.A. S. 622[1/] which makes the workmen's

1. The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensate under the provisions of this chapter shall exclude all other rights and remedies of such employee his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury.

compensation remedy of CV's employee exclusive, CV would be responsible to Telco to indemnify it on both grounds: first, under Article 13, Section 2, of the April 1, 1929, contract, "[e]ach party shall be liable for all damages for such injuries to its own employees ... that are caused by the concurrent negligence of both parties hereto or that are due to causes which cannot be traced to the sole negligence of the other party"; second, it was CV's "active negligence" in omitting to take sufficient temporary precautions in placing new tensions on Pole X-1 as set forth in the facts above that was the immediate and most proximate cause of the accident to David Sharp.

The question whether the exclusivity provision of the Vermont act precludes an indemnification action against the employer is one that has not been answered in the Vermont courts. Chief District Judge Leddy assumed without deciding that there was no preclusion in Farr v. J. Scanlon Co. See 441 F.2d at 1091. The question has been answered by different courts differently. Some state that the exclusivity provision relates solely to the employee's remedy. E.g., Trail Builders Supply Co. v. Reagan, 430 F.2d 828 (5th Cir. 1970) (following Florida law quoted at 831). Others, giving the exclusivity provision a broader construction, state that indemnification accrues only because of common liability and when that is absent (as to the employer, once it has paid compensation) there can be no indemnity and a contract provision to the contrary is void. E.g., Gulf Oil Corp. v. Rota-Cone Field Operating Co., 84 N.M. 483, 505 P.2d 78 (1972). Pointing out that the question is "[p]erhaps the most evenly-balanced controversy in all of compensation law," Larson (2 Workmen's Compensation Law Section 76.10, 14-287, hereinafter 2 Larson), while citing Gulf Oil Corp., supra, to the contrary, indicates that where an express contractual obligation to indemnify is

involved, the exclusivity section generally is held not to bar recovery on the basis that the third party's action for indemnity is not for the "damages" referred to therein but for reinbursement, and not "on account of" the employee's injury but on account of an independent duty owed by the employer to the third party. Id. at Section 76.30, 14-324. E.g., Ryan Stevedoring Co. vs. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956); 2 Larson Section 76.41 n.37. Where there is at most only an implied obligation of care arising from a contractual relationship, however, the state cases sharply diverge. Id. at Section 76.43 (d) n.61-62, 14-388-89. We need not reach the subtle (or nonexistent) distinctions between "active" and "passive" negligence or actual and constructive fault, see General Electric Co. v. Cuban American Nickel Co., 396 F.2d 89, 97-98 (5th Cir. 1968), for here we do have an express indemnity claim. While the Vermont Supreme Court has not yet determined whether to follow Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E. 2d 288, 331 N.Y.S.2d 382 (1972), in replacing contribution with indemnity, it has refused to follow it in replacing the all-or-nothing outcome in indemnity with proportionate-responsibility sharing, despite Vermont's new comparative negligence statute. Howard v. Spafford, supra. This does not mean, however, that the Vermont Supreme Court would also hold that no indemnity is permissible in an express contractual situation. Rather, I suspect it would follow the view taken by the majority, 2 Larson, supra at Section 76.30-76.41, in light of Spaulding v. Oakes, supra, and on the basis that to hold otherwise would be to fail to give effect to the intent of the contracting parties. Here the parties contracted having the Workmen's Compensation Act in mind as demonstrated by the specific language of Article XIII(4) of the April 1, 1929,

agreement.2/

While Article XIII(4) is ambiguously drafted in that it does not state whether workmen's compensation payments shall on the one hand be the only damages within the terms of paragraph 2 3/ or on the other hand be included in paragraph 2 damages, the interpretation of inclusion is the only one which does not nullify paragraph 2. If workmen's compensation were the sole measure of indemnity damages the phrase "liable for all damages for such injuries" (emphasis added) would have no effect since damages from injury can clearly exceed the limits of workmen's compensation.

Vermont has always construed the Workmen's Compensation statute in the case of ambiguity in a manner which favors the injured employee, e.g., Herbert v. Layman, 125 Vt. 481, 218 A.2d 706 (1966) (permitting employee to sue his

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2. Article XIII(4);

> Where, on account of injuries of the character described in the preceding paragraphs of this article, either party hereto shall make any payments to injured employees or to their relatives or representatives in conformity with (1) the provision of any workmen's compensation act or any act creating a liability in the employer to pay compensation for personal injury to an employee by accident arising out of and in the course of the employment whether based on negligence on the part of the employer or not, or (2) any plan for employees' disability benefits or death benefits now established or hereafter adopted by the parties hereto or either of them such payments shall be construed to be damages within the terms of the preceding paragraphs numbered 1 and 2 and shall be paid by the parties hereto accordingly.

3. Article XIII(2);

> Each party shall be liable for all damages for such injuries to its own employees ... that are caused by the concurrent negligence of both parties hereto or that are due to causes which cannot be traced to the sole negligence of the other party.

fellow servant as a third party). While the present case in no way affects the employee's rights, recovery on an express indemnification basis would coincidentally seem better to place responsibility on the ultimate wrongdoer, at least so far as fault was concerned. In any event these were two substantial corporations, of equal bargaining power, who may be taken to have known what they were doing when they wrote the contract pertaining to joint poles as they did. The order of the court is that CV be required to reimburse Telco for the $50,000 paid and attorneys' fees and expenses in the sum of $20,000.

CV's counterclaim against Telco is dismissed, since CV's negligence was independent of the negligence imputable to it as a result of any conduct by David Sharp and therefore bars recovery under 21 V.S.A. Section 624 of compensation paid. See Essick v. City of Lexington. 233 N.C. 600, 65 S.E.2d 220 (1951); Witt v. Jackson, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal Rptr. 369 (1961). It is this court's view that the Supreme Court of Vermont would decline to follow the suggestion of Corby v. Workmen's Compensation Appeals Board, 22 Cal. App. 3d 447, 99 Cal. Rptr. 242 (1971), that would permit CV to use its compensation paid as an offset to indemnity, particularly as Vermont does not believe a wrongdoer should be compensated. See generally, Dubie v. Cass-Warner Corp, 125 Vt. 476, 218 A.2d 694 (1966). In addition, although Article XIII(4) implies that workmen's compensation payments are Article XIII(2) damages, it does not mean that Telco must bear the cost of the workmen's compensation when it is entitled to indemnification. Rather it means that damages to Sharp are $58,000.

As indicated above, there is no showing of any possible responsibility on the part of Rutland Cable TV to indemnify either Telco or CV unless the

statement in Article XI(a) of the contract of April 27, 1961, that

> [w]hether caused by the negligence of the Licensors or either of them or otherwise, the Licensee shall indemnify and save harmless the Licensors and either of them from any and all claims ... including injuries to the employees ... of the Licensors or either of them ... arising out of, resulting from or in any manner caused by the installation, presence, use or maintenance of such attachments on the poles covered by this agreement ...

This broad responsibility under Article XI also covers

> any payments made by the Licensors or either of them to its or their injured employees ... in conformity with the provisions of any Workmen's Compensation Act ... or any act creating a liability in the Licensors or either of them to pay compensation for personal injury to an employee by reason of an accident arising out of or in the course of his employment.

While it is impossible to tell the extent of the stress of added tension caused by Cable TV's attachment to Pole X-1, any attachment, slack or not, creates some stress. It is altogether probable, therefore, that the accident would not have occurred had there been no Cable TV attachment. The statement of liability in Article XI is sufficiently broad to require Cable TV to indemnify both Telco and CV had Cable TV received notification of the proposed work. It was not within the contemplation of the parties as indicated by the second sentence in Article XI(a), merely to limit the agreement to indemnify on account of liability for any alleged act of negligence asserted by Cable TV; rather, the licensee took on the duties of an insurer holding it strictly liable without fault if its attachment in any way contributed to cause the accident.

Article V of the April 27, 1961, agreement provides, however,

> MAINTENANCE OF POLES AND ATTACHMENTS
>
> (a) Whenever the Licensors or either of them find it necessary to ... make a change in the type of character

of any of its attachments, the Licensors or either of them shall before doing the work give notice thereof, in writing (except in case of emergency, when verbal notice will be given and subsequently confirmed in writing) to the Licensee specifying in such notice the time of such work and the Licensee shall within the time so specified rearrange or transfer its attachments to the new or relocated poles at the Licensee's cost and expense.

(b) Any and all changes in existing facilities including additional guying necessary by reason of proposed attachments shall be performed by the Licensors, and the expense thereof shall be assumed by the Licensee.

And Article VII(b) provides in part:

if at any time in the opinion of the Licensors or either of them the use by the Licensee of the poles covered by this agreement for its attachments is endangering the employees of the Licensors ... or should the Licensors or either of them make a change in the type and character or location of any of their poles or attachments, the Licensee shall proceed at once, at its sole cost and expense, to make such changes as may be necessary, in its attachments, as a result thereof or shall discontinue the use of the facilities hereby granted, and if the Licensee shall fail to remove such default in due observance or performance of any covenants or conditions herein contained including the payment of any installment of rent, or other costs, or shall not have made such change or discontinued the use of or removed its facilities within sixty (60) days from the date the Licensee was notified in writing of said fact, then the Licensee's rights hereunder shall cease and terminate upon notice, in writing, from the Licensors or either of them. Such termination of the rights of Licensee, however, shall not operate as a termination of the liabilities and obligations of said Licensee which liabilities and obligations shall continue until the satisfactory removal of its facilities in accordance with the provisions hereof and after such removal as to liabilities accrued prior to the completion of said removal. In case of an emergency, verbal notice will be given and subsequently confirmed in writing. In such case either of the Licensors may, at the sole cost and expense of the Licensee, remove such attachments or take such other steps as either or both of them may deem necessary without liability to the Licensee or others.

(Emphasis added.)

CV failed to give notice to Cable TV of the change in attachments on Pole X-1 as was required by the agreement which also contains the indemnity

clause. Nor did CV notify Cable TV that its attachment was endangering CV's employees, as required by Article VII(b). The indemnity clause is broad, but not broad enough to be independent of a breach by CV of its contractual duty to notify. With notice, Cable TV would have had the opportunity to remove its attachment, and thus any resulting stress.

In construing written instruments to ascertain the intention of the parties, the Vermont courts seek to give effect to every material part and to form a harmonious whole. Cross-Abbott Co. v. Howards, Inc., 124 Vt. 439, 207 A.2d 134 (1965); Breding v. Champlain Marine & Realty Co., 106 Vt. 288, 172 A. 625 (1934). The notice provisions of the April 27, 1961, agreement must be considered as being in pari materia with Article XI. Whatever stress the TV cable was causing on Pole X-1, for the eight years or thereabouts it had been in place, the stress was insufficient to cause the pole to lean, let alone to fall. It was only when CV made its "change in the type of character of ... its attachments" that the TV cable stress came into operation causally.

Accordingly, the complaint against Cable TV is dismissed. Judgment is for Telco against CV for $70,000, together with interest at the legal rate from the time of payment of $50,000 to David Sharp and of $20,000 to Telco, and costs. Parties to settle judgment order on or before ten days from filing hereof.

So ordered.

Done at Brattleboro in the District of Vermont this 14th day of March, 1975.

JAMES L. OAKES
U. S. Circuit Judge
sitting by designation as
U. S. District Judge

CERTIFICATE OF SERVICE

I, JAMES L. MORSE, ESQ., hereby certify that I am the attorney for Appellant Central Vermont Public Service Corp. and that on the 25th day of July, 1975, I served two copies of Appellant's Brief and one copy of the Joint Appendix upon Pierson, Affolter & Amidon, Esqs., attorneys for the New England Telephone and Telegraph Co., 253 South Union Street, Burlington, Vermont, 05401, by placing copies of the same in an envelope properly addressed to them, said envelope bearing proper postage was deposited in the United States mail for delivery.

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